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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XC107

Takes of Marine Mammals Incidental to Specified Activities; Piling and Fill Removal in Woodard Bay Natural Resources Conservation Area, Washington

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that we have issued an incidental harassment authorization (IHA) to the Washington State Department of Natural Resources (DNR) to incidentally harass, by Level B harassment only, harbor seals during restoration activities within the Woodard Bay Natural Resources Conservation Area (NRCA).

DATES: This authorization is effective from November 1, 2012, through March 15, 2013.

ADDRESSES: A copy of the IHA and related documents are available by writing to Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

A copy of the application, including references used in this document, may be obtained by visiting the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. For those members of the public unable to view these documents on the internet, a copy may be obtained by writing to the address specified above or telephoning the contact listed below (see FOR FURTHER INFORMATION CONTACT). Associated documents prepared pursuant to the

National Environmental Policy Act (NEPA) are also available at the same site. Documents cited in this notice may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 et seq.) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is published in the Federal Register to provide public notice and initiate a 30-day comment period.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined 'negligible impact' in 50 CFR 216.103 as "...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine

mammals by Level B harassment as defined below. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization. If authorized, the IHA may be effective for a period of one year.

Except with respect to certain activities not pertinent here, the MMPA defines ‘harassment’ as: “any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].”

Summary of Request

On May 18, 2012, we received an application from the DNR for an IHA for the taking, by Level B harassment only, of small numbers of harbor seals (*Phoca vitulina*) incidental to activities conducted in association with an ongoing habitat restoration project within the Woodard Bay NRCA, Washington. DNR was first issued an IHA that was valid from November 1, 2010, through February 28, 2011 (75 FR 67951), and was subsequently issued a second IHA that was valid from November 1, 2011, through February 28, 2012 (76 FR 67419). Restoration activity planned for 2012-13 includes removal of fill and associated materials in Woodard Bay and Chapman Bay and removal of creosote pilings and structure in Chapman Bay. Pilings will be removed by vibratory hammer extraction methods or by direct pull with cables. The superstructure materials will be removed by excavator and/or cables suspended from a barge-

mounted crane. The specified activities will occur only between November 1 through March 15 (2012-13), and are expected to require a maximum total of approximately 70 days.

Description of the Specified Activity

In accordance with regulations implementing the MMPA, we published notice of the proposed IHA in the Federal Register on July 30, 2012 (77 FR 44583). A complete description of the action was included in that notice and will not be reproduced here.

The restoration activities planned under the IHA include all or part of the following:

1. Fill Removal

- Remove 13,000 yd³ of fill from Woodard Bay
- Remove 325 yd³ of fill from Chapman Bay
- Remove associated creosoted timber, pilings, metal scraps and concrete abutment

2. Piling and Structure Removal

- Remove 10,000 ft² of pier superstructure and 470 pilings from Chapman Bay Pier
- Remove 30 anchor piles from Chapman Bay

Fill removal from Woodard and Chapman Bays will be accomplished from the uplands by heavy equipment and haul trucks. The creosoted pilings in the fill will be removed from the uplands by a crane-mounted vibratory hammer. This portion of the project is estimated to take approximately 12-14 weeks to complete. The majority of fill removal work is located in Woodard Bay, which is separated from the harbor seal haul-out areas (located in Chapman Bay) by land. This work will likely result in less disturbance of harbor seals than will the work located in Chapman Bay. In addition, the material to be removed will be hauled offsite by the contractor via Whitham Road, which is the main road into the NRCA and which leads away from the haul-

out area (see Figure 4 of DNR's application). Fill removal will largely occur above the Ordinary High Water Mark. Fill removal activities may occur between November 1 and March 15.

Chapman Bay fill removal is roughly 250 m from the south haul-out and 975 m from the north haul-out.

Piling and structure removal work will be accomplished by barge and skiffs. The pilings will be removed by vibratory hammer or by direct pull with cables; both methods are suspended from a barge-mounted crane. The vibratory hammer is a large steel device lowered on top of the pile, which then grips and vibrates the pile until it is loosened from the sediment. The pile is then pulled up by the hammer and placed on a barge. For direct pull, a cable is set around the piling to grip and lift the pile from the sediment. The superstructure materials will be removed by excavator and/or cables suspended from a barge-mounted crane.

Approximately 500 12- to 24-in diameter pilings, along with associated pier superstructure, will be removed near but not directly adjacent to haul-outs. After vibration, a choker is used to lift the pile out of the water where it is placed on the barge for transport to an approved disposal site. Pilings that cannot be removed by hammer or cable, or that break during extraction, will be recorded via GPS for divers to relocate at the final phase of project activities. The divers will then cut the pilings at or below the mudline using underwater chainsaws. Operations will begin on the pilings and structures that are furthest from the seal haul-out so that there is an opportunity for the seals to adjust to the presence of the contractors and their equipment. Vibratory extraction operations may occur between November 1 and January 15 and are expected to occur for approximately 20 days over the course of this work window. Other work days will be spent removing pier superstructure, which does not involve vibratory extraction, but has the potential to result in behavioral harassment due to the proximity to

working crew. The portion of the Chapman Bay Pier that will be removed is approximately 100 m from the south haul-out area and 250 m from the north haul out.

Comments and Responses

On July 30, 2012, we published a notice of proposed IHA (77 FR 44583) in response to DNR's request to take marine mammals incidental to restoration activities and requested comments and information concerning that request. During the 30-day public comment period, we received comments from the Marine Mammal Commission (Commission) on the proposed IHA. No other comments were received from the public.

The Commission provided two recommendations that it has provided for each of the past two IHAs issued to DNR for substantially similar work. The Commission recommends that we (1) require the DNR to monitor for the presence of and to characterize behavior of marine mammals during all proposed in-water activities; and (2) that we require monitoring before, during, and after all soft starts of pile removal activities to gather the data needed to determine the effectiveness of this technique as a mitigation measure. We disagree with these recommendations, and the Commission has not provided any information that would lead us to offer different responses from those offered in the past. Therefore, those responses, which may be found in past Federal Register notices (75 FR 67951, 76 FR 67419), are not repeated here.

Description of Marine Mammals in the Area of the Specified Activity

The only marine mammal species that may be harassed incidental to DNR's restoration activities is the harbor seal. Harbor seals are not listed as threatened or endangered under the ESA, nor are they categorized as depleted under the MMPA. We presented a more detailed discussion of the status of the Washington inland waters stock of harbor seals and its occurrence in the action area in the notice of the proposed IHA (77 FR 44583; July 30, 2012).

Potential Effects on Marine Mammals

Potential effects of DNR's activities are likely to be limited to behavioral disturbance of seals at the two log boom haul-outs located in the action area. Other potential disturbance could result from the introduction of sound into the environment as a result of pile removal activities; however, this is unlikely to cause an appreciably greater amount of harassment in either numbers or degree, in part because it is anticipated that most seals will be disturbed initially by physical presence of crews and vessels or by sound from vessels.

There is a general paucity of data on sound levels produced by vibratory extraction of timber piles; however, it is reasonable to assume that extraction will not result in higher sound pressure levels (SPLs) than vibratory installation of piles. As such, we assume that source levels from the specified activity will not be as high as average source levels for vibratory installation of 12-24 in steel piles (155-165 dB; Caltrans, 2009). Our general in-water harassment thresholds for pinnipeds exposed to continuous noise, such as that produced by vibratory pile extraction, are 190 dB root mean square (rms) re: 1 μ Pa as the potential onset of Level A (injurious) harassment and 120 dB RMS re: 1 μ Pa as the potential onset of Level B (behavioral) harassment.

Vibratory extraction will not result in sound levels near 190 dB; therefore, injury will not occur. However, noise from vibratory extraction will likely exceed 120 dB near the source and may induce responses in-water such as avoidance or other alteration of behavior at time of exposure. However, seals flushing from haul-outs in response to small vessel activity and the presence of work crews would already be considered as 'harassed'; therefore, any harassment resulting from exposure to sound pressure levels above the 120 dB criterion for behavioral harassment would not be considered additional.

The airborne sound disturbance criteria currently used for Level B harassment is 90 dB rms re: 20 μ Pa for harbor seals. Based on information on airborne source levels measured for pile driving with vibratory hammer, removal of wood piles is unlikely to exceed 90 dB; further, the vibratory hammer will be outfitted with a muffling device ensuring that airborne SPLs are no higher than 80 dB.

Potential effects of sound produced by the action on harbor seals were detailed in the notice of the proposed IHA (77 FR 44583; July 30, 2012). In short, while it may be inferred that temporary hearing impairment (temporary threshold shift; TTS) could theoretically result from the DNR project, it is highly unlikely, due to the source levels and duration of exposure possible. It is expected that elevated sound will have only a negligible probability of causing TTS in individual seals. Further, seals are likely to be disturbed via the approach of work crews and vessels long before the beginning of any pile removal operations and would be apprised of the advent of increased underwater sound via the soft start of the vibratory hammer. It is not expected that airborne sound levels will induce any form of behavioral harassment, much less TTS in individual pinnipeds.

The DNR and other organizations, such as the Cascadia Research Collective, have been monitoring the behavior of harbor seals present within the NRCA since 1977. Past disturbance observations at Woodard Bay NRCA have shown that seal harassment results from the presence of non-motorized vessels (e.g., recreational kayaks and canoes), motorized vessels (e.g., fishing boats), and people (Calambokidis and Leathery, 1991; Buettner et al., 2008). Results of these studies are described in the proposed IHA notice for this action. Based on these studies, we anticipate that the presence of work crews and vessels will result in behavioral harassment,

primarily by flushing seals off log booms, or by causing short-term avoidance of the area or similar short-term behavioral disturbance.

In summary, based on the preceding discussion and on observations of harbor seals during past management activities in Woodard Bay, we have determined that impacts to harbor seals during restoration activities will be limited to behavioral harassment of limited duration and limited intensity (i.e., temporary flushing at most) resulting from physical disturbance. It is anticipated that seals would be initially disturbed by the presence of crew and vessels associated with the habitat restoration project. Seals entering the water following such disturbance could also be exposed to underwater SPLs greater than 120 dB (i.e., constituting harassment); however, given the short duration and low energy of vibratory extraction of 12-24 in timber piles, PTS will not occur and TTS is not likely. Alternatively, the presence of work crews and vessels, or the introduction of sound into the water, could result in short-term avoidance of the area by seals seeking to use the haul-out. Abandonment of any portion of the haul-out is not expected, as harbor seals have been documented as quickly becoming accustomed to the presence of work crews. During similar activities carried out under the previous IHAs, seals showed no signs of abandonment or of using the haul-outs to a lesser degree.

Anticipated Effects on Habitat

We provided a detailed discussion of the potential effects of this action on marine mammal habitat in the notice of the proposed IHA (77 FR 44583; July 30, 2012). While marine mammal habitat will be temporarily ensonified by low sound levels resulting from habitat restoration effort, no impacts to the physical availability of haul-out habitat will occur. It is expected that, at most, temporary disturbance of habitat potentially utilized by harbor seal prey species may occur as piles are removed. The DNR's restoration activities will result in a long-

term net positive gain for marine mammal habitat, compared with minimal short-term, temporary impacts.

Summary of Previous Monitoring

Please see the notice of the proposed IHA (77 FR 44583; July 30, 2012) for a summary of previous monitoring.

Mitigation

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

The DNR will continue certain mitigation measures stipulated in the previous IHAs, designed to minimize disturbance to harbor seals within the action area in consideration of timing, location, and equipment use. Foremost, pile, structure, and fill removal will only occur between November and March, outside of harbor seal pupping and molting seasons. Therefore, no impacts to pups from the specified activity during these sensitive time periods will occur. In addition, the following measures will be implemented:

- The DNR will approach the action area slowly to alert seals to their presence from a distance and will begin pulling piles at the farthest location from the log booms used as harbor seal haul-out areas;
- No piles within 30 yd (27 m) of the two main haul-out locations identified in the IHA application will be removed;

- The contractor or observer will survey the operational area for seals before initiating activities and wait until the seals are at a sufficient distance (i.e., 50 ft [15 m]) from the activity so as to minimize the risk of direct injury from the equipment or from a piling or structure breaking free;
- The DNR will require the contractor to initiate a vibratory hammer soft start at the beginning of each work day; and
- The vibratory hammer power pack will be outfitted with a muffler to reduce in-air noise levels to a maximum of 80 dB.

The soft start method involves a reduced energy vibration from the hammer for the first 15 seconds and then a 30-second waiting period. This method will be repeated twice before commencing with operations at full power.

We have carefully evaluated the applicant's mitigation measures as proposed and considered their effectiveness in past implementation to determine whether they are likely to effect the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures includes consideration of the following factors in relation to one another: (1) the manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals, (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; (3) the practicability of the measure for applicant implementation, including consideration of personnel safety, and practicality of implementation.

Injury, serious injury, or mortality to pinnipeds could likely only result from startling animals inhabiting the haul-out into a stampede reaction. Even in the event that such a reaction occurred, it is unlikely that it will result in injury, serious injury, or mortality, as the activities

will occur outside of the pupping season, and access to the water from the haul-outs is relatively easy and unimpeded. However, DNR will approach haul-outs gradually from a distance, and will begin daily work at the farthest distance from the haul-out in order to eliminate the possibility of such events. During the previous years of work under our authorization, implementation of similar mitigation measures has resulted in no known injury, serious injury, or mortality (other than one event considered atypical and outside the scope of the mitigation measures considered in relation to disturbing seals from the haul-outs). Based upon the DNR's record of management in the NRCA, as well as information from monitoring DNR's implementation of the improved mitigation measures as prescribed under the previous IHAs, we have determined that the planned mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat.

Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that we must set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

DNR's monitoring plan adheres to protocols already established for Woodard Bay to the maximum extent practical for the specified activity. Monitoring of both the north and south haul-outs will occur for a total of 15 work days, during the first 5 days of project activities, when the contractors are mobilizing and starting use of the vibratory hammer; during 5 days when activities are occurring closest to the haul-out areas; and during 5 additional days, to include days

when fill removal is occurring in Woodard Bay. It is not expected that Woodard Bay fill removal will result in seal disturbance; however, the stipulation that monitoring be conducted while this activity occurs is intended to ensure that such is the case. Monitoring of both haul-outs will be performed by at least one observer. The observer will (1) be on-site prior to crew and vessel arrival to determine the number of seals present pre-disturbance; (2) maintain a low profile during this time to minimize disturbance from monitoring; and (3) conduct monitoring beginning 30 minutes prior to crew arrival, during pile removal activities, and for 30 minutes after crew leave the site.

The observer will record incidental takes (i.e., numbers of seals flushed from the haul-out). This information will be determined by recording the number of seals using the haul-out on each monitoring day prior to the start of restoration activities and recording the number of seals that flush from the haul-out or, for animals already in the water, display adverse behavioral reactions to vibratory extraction. A description of the disturbance source, the proximity in meters of the disturbance source to the disturbed animals, and observable behavioral reactions to specific disturbances will also be noted. In addition, the observer will record:

- The number of seals using the haul-out on each monitoring day prior to the start of restoration activities for that day;
- Seal behavior before, during and after pile and structure removal;
- Monitoring dates, times and conditions;
- Dates of all pile and structure removal activities; and
- After correcting for observation effort, the number of seals taken over the duration of the habitat restoration project.

Within 30 days of the completion of the project, DNR will submit a monitoring report that will include a summary of findings and copies of field data sheets and relevant daily logs from the contractor.

Estimated Take by Incidental Harassment

We are authorizing DNR to take harbor seals, by Level B harassment only, incidental to specified restoration activities. These activities, involving extraction of creosoted timber piles and removal of derelict pier superstructure and fill, are expected to harass marine mammals present in the vicinity of the project site through behavioral disturbance only. Estimates of the number of marine mammals that may be harassed by the activities are based upon actual counts of harbor seals harassed during days monitored under the previous IHAs, and the estimated total number of working days. Methodology of take estimation was discussed in detail in our notice of proposed IHA (77 FR 44583; July 30, 2012).

DNR considers that 40 total work days (as opposed to the total work window, and not including days spent removing fill from the Woodard Bay area) may occur, potentially resulting in incidental harassment of harbor seals. Using the average count from monitoring under the previous IHAs, the result is an estimated incidental take of 1,680 harbor seals (40 days x 42 seals per day). We consider this to be a highly conservative estimate in comparison with the estimated actual take of 875 seals from 2010 and 231 seals from 2011, which is nonetheless based upon the best available information.

Negligible Impact and Small Numbers Analysis and Determination

We have defined 'negligible impact' in 50 CFR 216.103 as "...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

In determining whether or not authorized incidental take will have a negligible impact on affected species stocks, we consider a number of criteria regarding the impact of the proposed action, including the number, nature, intensity, and duration of Level B harassment take that may occur. Although DNR's restoration activities may harass pinnipeds hauled out in Woodard Bay, impacts are occurring to a small, localized group of animals. No mortality or injury is anticipated or authorized, and the specified activity is not expected to result in long-term impacts such as permanent abandonment of the haul-out. Seals will likely become alert or, at most, flush into the water in reaction to the presence of crews and equipment. However, seals have been observed as becoming habituated to physical presence of work crews, and quickly re-inhabit haul-outs upon cessation of stimulus. In addition, the specified restoration actions may provide improved habitat function for seals, both indirectly through a healthier prey base and directly through restoration and maintenance of man-made haul-out habitat. No impacts are expected at the population or stock level.

No pinniped stocks known from the action area are listed as threatened or endangered under the ESA or determined to be strategic or depleted under the MMPA. Recent data suggests that harbor seal populations have reached carrying capacity.

Although the estimated take of 1,680 is 11 percent of the estimated population of 14,612 for the Washington Inland Waters stock of harbor seals, the number of individual seals harassed will be lower, with individual seals likely harassed multiple times. In addition, although the estimated take is based upon the best information available, we consider the estimate to be highly conservative. For similar restoration activities in 2010-11, estimated actual take was much lower (875 seals over 35 work days in 2010 and 231 seals over 21 work days in 2011).

Mitigation measures will minimize onset of sudden and potentially dangerous reactions and overall disturbance. In addition, restoration work is not likely to affect seals at both haul-outs simultaneously, based on location of the crew and barge. Further, although seals may initially flush into the water, based on previous disturbance studies and maintenance activity at the haul-outs, the DNR expects seals will quickly habituate to piling and structure removal operations. For these reasons no long term or permanent abandonment of the haul-out is anticipated. Much of the work planned for 2012-13 consists of fill removal, which does not require in-water work or vessel support, and is largely located in Woodard Bay, which is shielded from the haul-out locations by land. The specified activity is not anticipated to result in injury, serious injury, or mortality to any harbor seal. The DNR will not conduct habitat restoration operations during the pupping and molting season; therefore, no pups will be affected by the specified activity and no impacts to any seals will occur as a result of the specified activity during these sensitive time periods.

Based on the foregoing analysis, behavioral disturbance to pinnipeds in Woodard Bay will be of low intensity and limited duration. To ensure minimal disturbance, DNR will implement the mitigation measures described previously, which we have determined will serve as the means for effecting the least practicable adverse effect on marine mammal stocks or populations and their habitat. We find that DNR's restoration activities will result in the incidental take of small numbers of marine mammals, and that the requested number of takes will have no more than a negligible impact on the affected species and stocks.

Impact on Availability of Affected Species for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action Endangered Species Act (ESA).

There are no ESA-listed marine mammals found in the action area; therefore, no consultation under the ESA is required.

National Environmental Policy Act (NEPA)

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), as implemented by the regulations published by the Council on Environmental Quality (40 CFR parts 1500-1508), and NOAA Administrative Order 216-6, we prepared an Environmental Assessment (EA) to consider the direct, indirect and cumulative effects to the human environment resulting from issuance of an IHA to DNR. We signed a Finding of No Significant Impact on October 27, 2010. We have reviewed the application and determined that there are no substantial changes to the action or new environmental impacts or concerns. Therefore, we have determined that a new or supplemental EA or Environmental Impact Statement is unnecessary.

The EA referenced above is available for review at

<http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

Determinations

We have determined that the impact of conducting the specific activities described in this notice and in the IHA request in Woodard Bay, Washington may result, at worst, in temporary modifications in behavior (Level B harassment) of small numbers of marine mammals. Further, this activity is expected to result in a negligible impact on the affected stock of marine mammals. The provision requiring that the activity not have an unmitigable impact on the availability of the affected species or stock of marine mammals for subsistence uses is not implicated for this action.

Authorization

As a result of these determinations, we have issued an IHA to DNR to conduct habitat restoration activities in Woodard Bay during the period of November 1, 2012, through March 15, 2013, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: September 4, 2012.

Helen M. Golde,
Acting Director,
Office of Protected Resources,
National Marine Fisheries Service.

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